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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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PD-0399-17

In The

Court of Criminal Appeals

Of the State of Texas

Austin, Texas

FILED
COURT OF CRIMINAL APPEALS
1/9/2018
DEANA WILLIAMSON, CLERK

KENYETTA DANYELL WALKER,
Respondent

vs.

THE STATE OF TEXAS,
Petitioner

On Petition for Discretionary Review in Cause 07-16-00245-CR
Trial Court No. B-150206-R, 163rd District Court, Orange County, Texas
Dennis Powell, Judge Presiding

BRIEF FOR RESPONDENT

Dustin R. Galmor
Attorney for Respondent
485 Milam
Beaumont, Texas 77701

January 8, 2018

IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

(a.) Kenyetta Danyell Walker, respondent

(b.) Thomas Burbank, 2 Acadiana Court, Beaumont TX 77706, counsel for appellant at trial.

(c.) Dustin Galmor, counsel for appellant on appeal, 485 Milam, Beaumont, TX 77701

(d.) Krispen Walker, counsel for the State, in the trial of this cause and on appeal, Office of the District Attorney, Orange County Courthouse, Orange, TX 77630, and Stacey M. Solue and Emily Johnson-Liu, Office of the State Prosecuting Attorney, P.O. Box 13046, Austin, TX 78711, counsel for the State on PDR.

Respectfully submitted,
/s/DUSTIN GALMOR
Attorney for Respondent

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for respondent submits that the facts and issues raised in the appeal are adequately set out in the brief for respondent.

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BRIEF FOR RESPONDENT

TO THE HONORABLE COURT:

KENYETTA DANYELL WALKER, defendant in Trial Cause No. B-150206 in the 163rd District Court, Orange County, Texas, Dennis Powell, Judge Presiding, and appellant in Court of Appeals Cause No.07-16-00245-CR, respectfully submits this brief to the Court for the purposes of responding to the State's Petition for Discretionary Review and the State's Brief thereon regarding her

conviction of engaging in organized criminal activity.

For convenience, the parties will be referred to as petitioner "the State" and respondent “Walker”. The reporter’s record will be referred to as RR.(Volume number)-(Page number) and the clerks’s record will be referred to as CR.(Volume number)-(Page number).

STATEMENT OF THE CASE

This matter is before this Court on the State's petition for discretionary review. This Court granted review and the State filed its brief on the merits on October 4, 2017. The respondent is Kenyetta Danyell Walker who was convicted of the offense of engaging in organized criminal activity, which conviction was reversed by the Court of Appeals. Respondent files this timely brief for respondent urging that this Court reform the holding of the Court of Appeals to a judgment of acquittal.

ISSUES PRESENTED

ISSUE NO. ONE: This Court should not reform the judgment of conviction of the allegation charged in the indictment to a lesser offense, but should instead reform the judgment to an acquittal.

STATEMENT OF FACTS

The underlying facts at trial which were the basis of the conviction of the allegations in the indictment are adequately set forth in the State's Brief on the Merits. Respondents agrees that she was convicted of allegations which do not constitute an offense under the penal laws of the State of Texas. Respondent files this brief urging this Court to reform the holding of the Court of Appeals to enter a judgment of acquittal.

ARGUMENTS AND AUTHORITIES

ISSUE NO. ONE: This Court should not reform the judgment of conviction of the allegation charged in the indictment to a lesser offense, but should instead reform the judgment to an acquittal.

SUMMARY OF THE ARGUMENT

Respondent contends that the State is correct in urging that Respondent should be acquitted of the offense of engaging in organized criminal activity. Respondent disagrees with the remedy proposed by the State. Respondent urges that this Court affirm the reversal of her conviction, but reform the judgment to an acquittal.

ARGUMENT

Respondent Walker originally urged that the evidence was insufficient to support her conviction, a position that the State now has adopted. The State, just as Walker urged, is correct that the evidence is insufficient to support the conviction. The allegation in the indictment is not an offense. As conceded by the State, one cannot be convicted of an offense that does not exist. Walker urges though, that the State is in error in claiming that the remedy is to reform the judgment to reflect a conviction of a different offense. The proper remedy is to afford deference to the

findings of the Court of Appeals regarding reversible error, but reform the judgment to reflect an acquittal. It is entirely proper to reverse the conviction for insufficiency of the evidence and simply to reform the judgment to reflect the acquittal. The jury was afforded an opportunity to convict Walker of the lesser offense of possession of a controlled substance but did not do so. CR.I-64. By analogy in *Granger v. State*, 850 S.W.2d 513 (Tex.Crim.App. 1993), the Court stated at page 514:

> "Our reversal in 1980 of appellant's original capital murder conviction, in contrast, did not constitute a decision that the State failed to prove the lesser included offense of murder. Because the evidence was insufficient only as to the capital element of the greater offense, it is clear both that, had the trial judge acted properly, only the lesser offense of murder would have gone to the jury and it would have resulted in a conviction. We know that it would have resulted in a conviction because the jury's actual verdict showed that it found the existence of every element of the lesser included offense."

This Court then acquitted the defendant in *Granger*, *Id.*, rather than entering a judgment of guilt on the lesser offense. Had the trial court herein charged the jury on *only* the lesser offense, the jury *may* have convicted Walker of the lesser offense only. The error of the trial court and jury did not mandate that the judgment be reformed to a conviction. This Court is empowered to reform the judgment to an acquittal. *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); *Burks v. U.S.* 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed.2.1 (1978). In fact, the instructions to the jury told the jury that it could convict Walker if the jury believed that she attempted to *aid* another person to commit the offense of engaging in organized criminal activity. CR.I-61. No appellate court can discern whether the jury believed Walker was guilty of a lesser attempted offense based on that language, rather than the offense the State now urges. The jury could have believed Walker was guilty of an attempted offense as contemplated by Texas Penal Code §15.01. The specific instructions allowed the jury to convict if the jury believed Walker "attempted to aid the other person to commit the offense" of engaging in organized activity. CR.I-61. It is mere conjecture as to any specific offense of which the jury would have convicted Walker, if she was acquitted of engaging in organized criminal activity. This Court must therefore afford deference to the factual findings of the appellate court regarding the insufficiency of the evidence but

not speculate in order to "find" a conviction for something. At the very least, this Court must remand to the Court of Appeals to determine that issue, but Walker does not concede that remedy. As stated in *Rabb v. State*, 434 S.W.3d 613 (Tex.Crim.App 2014) at page 618:

> "The State's final argument is that, upon finding the evidence insufficient to show Appellant 'destroyed' the evidence, the court of appeals should have reformed his conviction to attempted tampering with evidence rather than entering a judgment of acquittal.
>
> "The State bases this argument on our decision in *Bowen v. State*, 374 S.W.3d 427 (Tex. Crim. App. 2012), in which we overruled *Collier v. State*, 999 S.W.2d 779 (Tex. Crim. App. 1999) and ordered the reformation of an acquittal judgment to reflect a conviction on a lesser-included offense.
>
> "Neither the State nor the court of appeals had the benefit of our decision in *Thornton v. State*, which was rendered on April 2, 2014. In Thornton we held that:
>
> > [A]fter a court of appeals has found the evidence

insufficient to support an appellant's conviction for a greater-inclusive offense, in deciding whether to reform the judgment to reflect a conviction for a lesser-included offense, that court must answer two questions: 1) in the course of convicting the appellant of the greater offense, must the jury have necessarily found every element necessary to convict the appellant for the lesser-included offense; and 2) conducting an evidentiary sufficiency analysis as though the appellant had been convicted of the lesser-included offense at trial, is there sufficient evidence to support a conviction for that offense? If the answer to either of these questions is no, the court of appeals is not authorized to reform the judgment. But if the answers to both are yes, the court is authorized-indeed required-to avoid the "unjust" result of an outright acquittal by reforming the judgment to reflect a conviction for the

lesser-included offense.

425 S.W.3d at 299-300.

Ironically after remand, the Court of Appeals found the evidence insufficient as to the lesser offense, and this Court simply substituted its judgment for the factual findings and entered a judgment of conviction. *Rabb v. State*, 483 S.W.3d 16 (Tex.Crim.App. 2016). Nothwithstanding *Thornton, supra,* Walker urges that this Court is empowered to reform the judgment to an acquittal based on the instructions to the jury. This Court cannot determine that the jury did not believe Walker was guilty of an inchoate offense. The jury could have convicted Walker even if she only attempted to aid another in the commission of the "offense" of conviction. Charged with only the lesser offense of which the State urges conviction, Walker may have been found not guilty. The burden would have been upon the State to prove Walker did more than mere preparation, to-wit: aiding another to commit the offense of engaging in organized criminal activity. In *Bruffy v. State*, 2002 Tex. App. LEXIS 4225, 2002 WL 1292011 (Tex.App. Dallas 2002)(not designated for publication), the appellate court noted:

> "The burden remains on the State to prove an attempt, and appellant is not precluded from offering in her defense evidence

she did not have the specific intent to commit the charged offense or did not commit an act amounting to more than mere preparation."

Careful analysis reveals that the State would have Walker convicted of the lesser offense even if the jury believed Walker *aided* another in committing the non-offense alleged in the indictment. The fallacy in that reasoning is that the "offense" that Walker would have aided in the commission thereof is not an offense. Therefore, the logic begs the question of how Walker could be convicted of a lesser offense when the jury only believed under the instructions that she *aided* in the commission of a *non-offense*. While the jury could have convicted Walker of the lesser offense, the jury could also have acquitted Walker as to the lesser offense with proper instructions, even if that seems illogical. As stated in *Moore v. State*, 969 S.W.2d 4 (Tex.Crim.App. 1998) at page 13:

"The Court in Beck recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the

defendant is guilty of capital murder, but simply to avoid setting the defendant free."

The instructions in this case did not properly address the lesser included offense since the primary instructions related in part to an inchoate lesser offense. The State urges that this Court must order the conviction of the lesser offense. Notwithstanding *Thornton, supra*, the overwhelming language of the cases addressing this issue refer to the fact that the appellate court *may* enter a judgment of conviction as to a lesser offense. Walker urges that this Court defer to the decision of the Court of Appeals in reversing the conviction of the offense of engaging in organized criminal activity, and reform the judgment to an acquittal.

For these reasons, appellant urges that this cause be reversed, and that this Court of Criminal Appeals, should reform the judgment of the Court of Appeals, and enter a judgment of acquittal.

PRAYER

WHEREFORE, it is respectfully submitted, and appellant prays, that the Court of Criminal Appeals, should reform the judgment of the Court of Appeals, and enter a judgment of acquittal.

Respectfully submitted,
/s/DUSTIN GALMOR
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellant was served upon appellee by delivering an electronic copy to the Office of the District Attorney, Orange County Courthouse, Beaumont, Texas, 77701, on the date of filing hereof.

Respectfully submitted,
/s/DUSTIN GALMOR

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned certifies this brief complies with the type-volume limitations of Texas Rule of Appellate Procedure 9.4(e).

1. Exclusive of the exempted portions in Texas Rule of Appellate Procedure 9.4(i)(1)), the brief contains:

A. 1,696 words.

2. The brief has been prepared:

A. In proportionally spaced typeface using:
Microsoft Word in 14 point Times New Roman Font.

3. The undersigned understands that a material misrepresentation in completing this certificate, or a circumvention of the type-volume limits in Texas Rule of Appellate Procedure 9.4(e), may result in the court's striking the brief and returning same with identification of the error to be corrected.

Respectfully submitted,
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